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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8 Denny Rizzo, an individual,  
9  
10 Plaintiff,

No. CV-15-00829-PHX-NVW

**ORDER**

11 v.

12 City of Phoenix, a political subdivision of  
13 the State of Arizona; Anthony Hardina  
14 (Badge No. 8076), in his individual  
capacity as an officer with the City of  
Phoenix Police Department,

15 Defendants.

16  
17 Before the Court is Defendants' Motion for Summary Judgment (Doc. 108).

18 **I. LEGAL STANDARD**

19 A motion for summary judgment tests whether the opposing party has sufficient  
20 evidence to merit a trial. Summary judgment should be granted if the evidence reveals no  
21 genuine dispute about any material fact and the moving party is entitled to judgment as a  
22 matter of law. Fed. R. Civ. P. 56(a). A material fact is one that might affect the outcome  
23 of the suit under the governing law, and a factual dispute is genuine "if the evidence is  
24 such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v.*  
25 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

26 The movant has the burden of showing the absence of genuine disputes of material  
27 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, once the movant  
28 shows an absence of evidence to support the nonmoving party's case, the burden shifts to

1 the party resisting the motion. The party opposing summary judgment must then “set  
2 forth specific facts showing that there is a genuine issue for trial” and may not rest upon  
3 the pleadings. *Anderson*, 477 U.S. at 256. If a party fails to properly support an assertion  
4 of fact or fails to properly address another party’s assertion of fact, the court may  
5 consider the fact undisputed for purposes of the motion. Fed. R. Civ. P. 56(e)(2). In  
6 deciding a motion for summary judgment, the Court must view the evidence in the light  
7 most favorable to the nonmoving party, must not weigh the evidence or assess its  
8 credibility, and must draw all justifiable inferences in favor of the nonmoving party.  
9 *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477  
10 U.S. at 255.

11 The Local Rules require that any party filing a motion for summary judgment file  
12 a statement, separate from the motion and memorandum of law, that sets forth each  
13 material fact on which the party relies in support of the motion. LRCiv. 56.1(a). “Each  
14 material fact in the separate statement must be set forth in a separately numbered  
15 paragraph and must refer to a specific admissible portion of the record where the fact  
16 finds support (for example, affidavit, deposition, discovery response, etc.)” *Id.* Only  
17 material facts should be included in the separate statement of facts; other undisputed facts  
18 that provide context may be included in the memorandum of law. *Id.*

19 Any party opposing a motion for summary judgment must file a separate  
20 controverting statement of facts that sets forth:

- 21 (1) for each paragraph of the moving party’s separate  
22 statement of facts, a correspondingly numbered paragraph  
23 indicating whether the party disputes the statement of fact set  
24 forth in that paragraph and a reference to the specific  
25 admissible portion of the record supporting the party’s  
26 position if the fact is disputed; and (2) any additional facts  
27 that establish a genuine issue of material fact or otherwise  
28 preclude judgment in favor of the moving party. Each  
additional fact must be set forth in a separately numbered  
paragraph and must refer to a specific admissible portion of  
the record where the fact finds support.

1 LRCiv 56.1(b). Although the nonmoving party's separate controverting statement of  
2 facts may include "additional facts," it should not include undisputed facts, such as  
3 background about the action or the parties.

4 The moving party may file a reply memorandum, but the Local Rules do not  
5 authorize filing a separate statement responding to the nonmoving party's controverting  
6 statement of facts. *See* LRCiv 56.1(d). The moving party may include its objections to  
7 the nonmoving party's controverting statement of facts in its reply memorandum. LRCiv  
8 7.2(m)(2). The moving party would need to seek and obtain leave to file another separate  
9 statement. If such leave were granted, the nonmoving party would be granted  
10 opportunity to respond. Therefore, the Court has not considered Defendants'  
11 Response/Objections to Plaintiff's Separate Statement of Facts in Opposition to  
12 Defendant's Motion for Summary Judgment (Doc. 118), which is not authorized by the  
13 Local Rules and for which leave of court was not sought. It is stricken from the record.

14 Further, in response to a motion for summary judgment, "any objection in the  
15 party's response to the separate statement of facts must be stated summarily without  
16 argument." LRCiv. 7.2(m). Therefore, the argument included in Plaintiff's Separate  
17 Statement of Facts and Response to Defendants' Statement of Facts (Doc. 112) has not  
18 been considered.

## 19 **II. UNDISPUTED MATERIAL FACTS**

20 Shortly before midnight on September 11, 2013, Michael Collins was stabbed on  
21 the grounds of the Missouri Crossing Apartment Complex in Phoenix, Arizona. Two  
22 residents of the complex called 911 and reported a man lying on the sidewalk, bleeding  
23 profusely, and throwing gravel at a nearby car. The Phoenix Police Department  
24 responded, and Officer Joel Kaminsky spoke with Collins. Kaminsky recalled hearing  
25 Collins say he was HIV-positive and had been stabbed by someone named "Frankie."

26 Collins was transported to St. Joseph's Hospital, and a police officer arrived at the  
27 hospital before the ambulance. The officer asked Collins his name several times before  
28 he responded, "Michael." The officer then asked Collins who had stabbed him. The

1 officer believed that Collins responded, “Frankie.” Collins was unable to answer any  
2 further questions. Collins subsequently underwent amputation of his left arm, suffered  
3 multiple strokes, and died on September 16, 2013.

4 When officers arrived at the apartment complex, there was blood on the ground  
5 around the victim, on the sidewalk, on a stairway between the ground floor and the  
6 second floor, on the second-floor landing in front of the doors to apartments A-10, A-11,  
7 and A-12, and on the door to apartment A-11. Police interviewed people who were  
8 standing near the victim, those who had called 911, and residents who were home and  
9 answered knocks on their doors.

10 An officer spoke with the resident of apartment A-10 and reported finding no  
11 blood inside A-10. When no one responded to a knock on the door of apartment A-11, a  
12 key to A-11 was obtained from a maintenance person for the complex, who said that the  
13 occupant of A-11 had been evicted earlier in the day, and he believed the apartment was  
14 empty. When the door to apartment A-11 was opened, Plaintiff Denny Rizzo emerged  
15 and said he had not answered the door because he thought the officers were there to evict  
16 him. Four officers checked the apartment and found no one else or any signs of an  
17 altercation in the apartment or on Rizzo. They told Rizzo to go back inside the  
18 apartment. After police learned that Rizzo had an outstanding misdemeanor arrest  
19 warrant from the City of Glendale, he was arrested on the misdemeanor warrant and  
20 taken to police headquarters.

21 At approximately 4:30 a.m. on September 12, 2013, Detective Jeremy Herrera  
22 interviewed the residents of apartment A-7 from which a call to 911 had been made.  
23 They reported hearing the victim say he was HIV-positive and “Frank stabbed me.” One  
24 of them said he believed the victim hung around with the resident of apartment A-11 who  
25 went by the name of “Frankie.” Later in the morning, the other resident of A-7 identified  
26 Rizzo from a photo lineup as the resident of A-11 and said Rizzo had introduced himself  
27 as “Frankie.”  
28

1           At approximately 5:30 a.m., Defendant Detective Anthony Hardina was informed  
2 about the stabbing incident and assigned as the case agent. Hardina was told that the  
3 victim had been taken to the hospital and said that a man named “Frankie” had stabbed  
4 him. He was also told that two witnesses stated they knew Rizzo as “Frank” or  
5 “Frankie.” At approximately 7:00 a.m., Hardina began interviewing Rizzo. Hardina  
6 reported that Rizzo said he usually goes by the name Denny and had never been called  
7 “Frank” or “Frankie.” Rizzo said he had moved into his apartment in June 2013, was  
8 served eviction papers, and was waiting for the constable to return to evict him out of his  
9 apartment. He said he had been inside his apartment the whole night. Rizzo denied  
10 knowing the victim or any of the witnesses and denied getting into any argument with the  
11 victim. Rizzo repeatedly denied that he had ever been known as “Frank” or “Frankie.”  
12 He said he would be willing to take a polygraph test. Hardina contacted the polygrapher,  
13 but he was not available.

14           In the early morning of September 12, 2013, Detectives Jeremy Rose and Jason  
15 Robidoux were assigned as the crime scene investigators. Robidoux reported that he and  
16 Rose arrived on the scene at approximately 7:30 a.m. and did a walk through. His initial  
17 observations indicated that the stabbing likely occurred at the apartment complex  
18 playground. He observed a blood trail along a sidewalk and up a stairwell to a shared  
19 landing on the second floor. Robidoux reported that it was determined that he would  
20 serve the search warrant on apartment A-11 and process apartment G-1, which appeared  
21 to be vacant with an open door and reportedly was used by the victim.

22           At 8:10 a.m., Robidoux served the search warrant on A-11. He was accompanied  
23 by a crime scene specialist. Robidoux reported finding two smudges of a bloodlike  
24 substance, one approximately one centimeter in diameter, the other smaller,  
25 approximately three feet above the floor on different walls. He also reported finding a  
26 larger smear of another deposit of bloodlike substance approximately four feet above the  
27 floor and approximately four centimeters in diameter. He also reported finding a deposit  
28 of a red substance less than five millimeters in diameter on a bathroom wall, a drop in the

1 bathtub, a deposit on the edge of an air mattress in a bedroom, a deposit less than five  
2 millimeters in diameter on a vertical blind slat on a bedroom window, and a deposit  
3 approximately two millimeters by one centimeter in the shower of the second bathroom.  
4 Robidoux reported that near the air mattress was a sleeveless undershirt with a red  
5 bloodlike substance present in various places on the shirt.

6 Also at approximately 8:10 a.m., the complex's maintenance supervisor showed  
7 Rose a knife in the grass, which was wet after the sprinkler system had run and had no  
8 obvious sign of biological material. The knife was a folding knife with its approximately  
9 four-inch blade fully extended.

10 At approximately 11:00 a.m., Hardina interviewed by telephone Jessica Lare, who  
11 resided in apartment G-6. She said that early in the morning on September 11 she saw a  
12 white man yelling threats and throwing rocks up at apartment G-4. She said that she saw  
13 two men arguing, but did not know either man's name. One was white, and the other was  
14 a short Hispanic man with tattoos on his back and face.

15 At approximately 11:40 a.m., Detective Gail Aamodt began knocking on  
16 apartment doors at the complex. Most of the residents that Aamodt spoke with were not  
17 home or did not see or hear anything during the night of September 11. Aamodt reported  
18 that she interviewed Richard Garcia, the maintenance man for the apartment complex.  
19 Garcia said he had heard that Collins caused trouble in the complex, owed many people  
20 money, and had been evicted twice. About 12:30 p.m., Aamodt re-contacted Garcia and  
21 showed him a photo lineup that included Rizzo. Aamodt asked Garcia whether he could  
22 identify any of the males in the photos as "Frankie." Garcia said the only one he  
23 recognized was Rizzo and that was only because he lived in apartment A-11. Garcia said  
24 he did not know Rizzo's name, management had no problems with him, and Rizzo was  
25 really quiet and kept to himself. Aamodt asked Garcia if he knew someone named Denny  
26 who went by the nickname "Frankie," and Garcia said he did not. Garcia said he knew  
27 about the brother of the resident living in apartment G-4 and heard he went by the name  
28 "Smokey" or something similar. Garcia said he did not know whether "Smokey's" real

1 name was “Frankie.” Aamodt reported that Garcia said he did not know anyone in the  
2 complex named “Denny” or “Frankie,” but that he was not good with names, only  
3 apartment numbers.

4 While Hardina was interviewing Rizzo, he was informed that a search of Rizzo’s  
5 apartment found bloody footprints along with blood spatter on the walls, in the bathroom,  
6 in the master bedroom, and on a shirt. When Hardina told Rizzo, Rizzo stated that police  
7 had taken him downstairs through the victim’s blood and then returned him to his  
8 apartment, tracking blood into his apartment. Rizzo also said the shirt with blood was  
9 really a rag that he had used for a bloody nose three or four days earlier. Rizzo said any  
10 DNA found in his apartment would be his own except for what he tracked in from the  
11 victim’s blood outside his apartment. Rizzo repeatedly denied any involvement in the  
12 stabbing incident.

13 Hardina reported that he was informed that one of Rizzo’s neighbors had picked  
14 him out of a photo lineup and said he knew Rizzo as “Frank.” He also reported that he  
15 was informed that a maintenance person for the complex said he knew Rizzo as “Frank.”

16 About noon, Rose was approached by Ronnie Bowman in the apartment complex  
17 parking lot. Bowman was extremely upset and cried multiple times while talking to  
18 Rose. Bowman said he had witnessed a verbal confrontation between Collins and a black  
19 male, whom he referred to as “Smokey,” during the day of September 11, 2013, at a  
20 nearby park. Bowman said that Collins was trying to get a food stamp card from  
21 “Smokey,” and Bowman thought it was related to crystal meth. Bowman said he heard  
22 “Smokey” tell Collins, “Don’t come back around my apartment or I’ll get you.” (Doc.  
23 112-3 at 6.) Bowman said that Collins was living in apartment G-1, which was vacant,  
24 and “Smokey” stayed in the apartment upstairs from G-1.

25 Hardina reported that on September 16, 2013, he interviewed Stefanee Perez, who  
26 lived in apartment G-6 with Jessica Lare. Perez told Hardina that she had heard someone  
27 she thought was Collins yelling and banging on the door of apartment G-4 the night of  
28 the incident and that Collins had also done this the previous two nights. Perez said she

1 did not see who Collins was yelling at the night of the incident, but said on previous  
2 nights he had argued with a man staying in G-4 who was Hispanic, in his late 20's, with  
3 tattoos on his neck and a shaved head. Perez said she would be able to recognize who  
4 Collins was arguing with, but she did not know whether he was involved in the stabbing  
5 incident. She also said many other people, including Collins, came and went from  
6 apartment G-4. Perez told Hardina that on the night of the incident she heard Collins  
7 threatening someone, the door to G-4 open, someone go down the stairs, "something that  
8 hit and a piece of metal fall," and a girl scream and say she was going to call 911.

9 On September 16, 2013, Deputy County Attorney Leslie LeMense filed a direct  
10 complaint charging Rizzo with aggravated assault. Also on September 16, 2013, Hardina  
11 submitted a Priority Request for DNA analysis of the blood taken from apartment A-11.  
12 The Request said Rizzo was in custody, which meant the Phoenix Police Crime Lab  
13 would consider it a highest priority case. The Crime Lab began its forensic biology  
14 screening on September 16 or 17, 2013. In the Crime Lab, even the highest priority in-  
15 custody DNA requests take three to six months to turn around due to the volume of cases  
16 in the lab and the amount of time it takes to process the analyses.

17 On September 17, 2013, Perez identified Collins from a photo lineup as the victim.  
18 When shown a photo lineup that included a photo of Rizzo, Perez did not recognize  
19 anyone.

20 On September 18, 2013, Hardina interviewed an employee of the apartment  
21 complex's leasing office. Hardina was told that Anthony Hicks is the brother of  
22 Angelina Ruiz, Ruiz leased apartment G-4, Ruiz's mother is Anita Hicks,<sup>1</sup> Anthony  
23 Hicks was known as "Smokey," and "Smokey" was staying in G-4 but not named on the  
24 lease. Hardina reported that he was told that neither Ruiz nor "Smokey" had been seen  
25 since the incident.

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27  
28 <sup>1</sup> Anita Hicks is one of the residents who called 911 regarding the stabbing  
incident.



1           On September 19, 2013, Hardina interviewed Angelina Ruiz by telephone. Ruiz  
2 said she had been living in apartment G-4, but she currently was living in apartment A-17  
3 with her mother because she was afraid to live alone. She said she had moved back with  
4 her mother about three or four days before the stabbing incident. Although the lease for  
5 apartment G-4 was in her name, Ruiz said that she was not in the apartment the night of  
6 the incident or in the days just before the incident. Hardina reported that Ruiz said the  
7 only person who could be in her apartment was her brother Anthony Hicks, and he went  
8 by the name of "Smokey." Ruiz said that "Smokey's" girlfriend probably was with him  
9 the night of the incident. Ruiz said that she did not know the victim or anyone by the  
10 name of "Frankie." She said she did not see the incident, but only called 911 after the  
11 victim was throwing rocks at the back door of apartment A-17. She also said she did not  
12 know where "Smokey" was living or where he was at this time.

13           On September 20, 2013, Rizzo was charged with second degree murder. A  
14 warrant was issued for his arrest. A commissioner signed the warrant finding probable  
15 cause to arrest. Rizzo then attended an initial appearance during which a judicial officer  
16 reviewed the probable cause statement and also affirmatively found that "probable cause  
17 was determined."

18           On September 30, 2013, Hardina testified before the Maricopa County Grand Jury.  
19 Hardina informed the grand jurors that (a) Rizzo denied any involvement, (b) Rizzo  
20 stated that he was sleeping at the time, and (c) Rizzo explained that if the victim's blood  
21 was in his apartment it was only because he tracked it in on his feet after officers allowed  
22 him to return to his apartment. Hardina described the blood swipes or transfer marks  
23 found on the wall, in the bathroom, and on the window blinds of Rizzo's apartment and  
24 on a white tank top in the bedroom. Hardina told the grand jurors that DNA analysis had  
25 not been completed to determine whose blood was found in Rizzo's apartment and that  
26 Rizzo said he had had a bloody nose four days earlier. Hardina reported that the officers  
27 who executed the search warrant in apartment A-11 did not believe the blood found there  
28 was four days old. Hardina also said that the police had not yet developed any

1 relationship between Rizzo and Collins and that, as far as Hardina knew, Rizzo had not  
2 had any previous assaults or trouble in the apartment complex.

3 On September 30, 2013, the grand jury indicted Rizzo for second degree murder.

4 On February 28, 2014, the Phoenix Police Department received the results of the  
5 DNA testing, which showed that the blood found in Rizzo's apartment was Rizzo's, not  
6 that of the victim. Hardina recommended that the charges against Rizzo be dismissed.  
7 On April 4, 2014, the charges against Rizzo were dismissed without prejudice. On April  
8 22, 2014, the Maricopa County Sheriff's Office released Rizzo from custody.

### 9 **III. ANALYSIS**

10 The Complaint alleges three state law claims and one federal claim against both  
11 Anthony Hardina, an officer with the Phoenix Police Department named in his individual  
12 capacity, and the City of Phoenix, under the doctrine of *respondeat superior* for the state  
13 law claims.

#### 14 **A. Count Four: 42 U.S.C. § 1983 Malicious Prosecution and Violation of** 15 **the Fourth and Fourteenth Amendments of the U.S. Constitution**

16 Count Four alleges that Defendants "arrested and prosecuted Plaintiff without  
17 probable cause to believe he had committed a crime, and Defendants initiated the  
18 prosecution with reckless disregard of the facts and/or with malice." (Doc. 1-1 at 13-14.)

19 Under § 1983, a municipality cannot be held liable under a *respondeat superior*  
20 theory. *Fogel v. Collins*, 531 F.3d 824, 834 (9th Cir. 2008). The City of Phoenix is  
21 liable for the violation of Rizzo's constitutional rights only if the conduct of its police  
22 officers is directly attributable to the City's policy or custom. *See id.* Rizzo does not  
23 allege or provide evidence that his rights were violated because of a policy or custom of  
24 the City of Phoenix. Therefore, only Hardina can be liable under Count Four.

25 The Arrest. Rizzo claims he was arrested on September 16, 2013, for murder  
26 without a warrant or probable cause. That is incorrect. The evidence shows that he was  
27 arrested on September 12, 2013, on a misdemeanor warrant from the City of Glendale.  
28 On September 16, 2013, the Deputy County Attorney filed a direct complaint charging

1 Rizzo with aggravated assault. On September 20, 2013, Rizzo was charged with second  
2 degree murder and a warrant was issued for his arrest based on a judicial officer's  
3 determination of probable cause. On September 30, 2013, the grand jury returned an  
4 indictment for second degree murder.

5 Probable Cause. Civil rights are not violated by an arrest based on probable cause  
6 even though the arrestee's innocence may be established subsequently. *Beauregard v.*  
7 *Wingard*, 362 F.2d 901, 903 (9th Cir. 1966). Although Rizzo bears the ultimate burden  
8 of proof on the issue of unlawful arrest, Defendants bear the burden of producing  
9 evidence that the arresting officers had probable cause for an arrest. *Dubner v. City &*  
10 *Cnty. of San Francisco*, 266 F.3d 959, 965 (9th Cir. 2001). "Probable cause exists when,  
11 under the totality of the circumstances known to the arresting officers (or within the  
12 knowledge of the other officers at the scene), a prudent person would believe the suspect  
13 had committed a crime." *Id.* at 966; *accord Blankenhorn v. City of Orange*, 485 F.3d  
14 463, 482 (9th Cir. 2007).

15 "Whether probable cause exists depends upon the reasonable conclusion to be  
16 drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck*  
17 *v. Alford*, 543 U.S. 146, 152 (2004). To determine probable cause, police may rely on  
18 hearsay, information received from informants, and other evidence that would not be  
19 admissible in court. *Hart v. Parks*, 450 F.3d 1059, 1066 (9th Cir. 2006). Police officers  
20 may draw inferences from and make deductions about the cumulative information  
21 available to them. *Id.* at 1067. When officers have communicated, probable cause can be  
22 based upon the collective knowledge of the investigating officers. *Blankenhorn*, 485  
23 F.3d at 472. Although officers may rely on the totality of the circumstances known to  
24 them in establishing probable cause, they may not disregard facts tending to dissipate  
25 probable cause. *Crowe v. Cnty. of San Diego*, 608 F.3d 406, 433 (9th Cir. 2010).

26 "Whether a given state of facts constitutes probable cause is always a question of  
27 law to be determined by the court." *Slade v. City of Phoenix*, 112 Ariz. 298, 301, 541  
28 P.2d 550, 553 (1975). "The existence of probable cause necessarily turns upon the

1 particular facts of the individual case, and prior decisions generally are of little help in  
2 deciding a specific case.” *John v. City of El Monte*, 515 F.3d 936, 941 (9th Cir. 2008).

3 Rizzo initially was arrested on a misdemeanor warrant from the City of Glendale.  
4 When Rizzo was arrested at police headquarters for aggravated assault, Hardina had been  
5 told the following: (1) Collins was stabbed, (2) Collins said he was stabbed by  
6 “Frankie,” (3) a blood trail led up the stairway to a landing in front of apartment A-11,  
7 (4) there was a blood smear on the door of A-11, (5) traces of blood and a bloody shirt  
8 were found inside of apartment A-11, (6) Rizzo lived in apartment A-11, and (7) a  
9 witness said Rizzo had introduced himself as “Frankie.” The information that Collins  
10 had a conflict with someone named “Smokey,” who did not look like Rizzo, did not  
11 eliminate Rizzo as a suspect. Based on the information known to Hardina at the time of  
12 the arrest, a prudent person would have concluded there was probable cause to think that  
13 Rizzo committed the crime.

14 Further, probable cause for an arrest may be satisfied by a grand jury indictment.  
15 *Hart*, 450 F.3d at 1070. Rizzo has not demonstrated that the indictment was invalid or  
16 based on false and misleading testimony. Some of Hardina’s testimony was inaccurate,  
17 but the errors were not prejudicial. For example, Hardina described the knife found in  
18 the grass courtyard as a kitchen knife instead of a folding knife, and he described the  
19 blood on the door to apartment A-11 as “dripping” instead of a palm print or smear.  
20 Hardina explained to the grand jury all of the information he did not have, such as DNA  
21 test results, an eyewitness to the stabbing, and any evidence that Rizzo knew Collins.  
22 Thus, the grand jury indictment establishes probable cause for Rizzo’s arrest. There was  
23 no indication that Hardina had fabricated any of the evidence.

24 The Prosecution. Malicious prosecution involves the wrongful use of legal  
25 process. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 919 (9th Cir. 2012). In order to prevail  
26 on an action under 42 U.S.C. § 1983 for malicious prosecution, a plaintiff must show that  
27 the defendants prosecuted him with malice and without probable cause for the purpose of  
28 denying him equal protection or another specific constitutional right. *Id.*

1           The plaintiff also must show that criminal proceedings were instituted against him  
2 for an offense of which he was not guilty and that the proceedings were terminated in his  
3 favor. *Id.*; *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). This requirement avoids  
4 parallel litigation regarding probable cause and guilt and precludes the possibility of a  
5 claimant succeeding in a tort claim after being convicted in the underlying criminal  
6 prosecution. *Id.* “An individual seeking to bring a malicious prosecution claim must  
7 generally establish that the prior proceedings terminated in such a manner as to indicate  
8 his innocence.” *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004).

9           The Complaint alleges that the prosecution against Rizzo terminated in his favor  
10 on April 1, 2014, when all charges against him were dismissed without prejudice.  
11 Defendants’ Motion for Summary Judgment contends the prosecution against Rizzo did  
12 not terminate in his favor because a prosecutor’s dismissal of a case does not terminate a  
13 case in favor of a defendant unless it can be shown from the record that the prosecutor  
14 manifested an intent to abandon the prosecution and the record here does not show an  
15 intent to abandon. Rizzo did not respond to Defendant’s contention. Rizzo has not  
16 established that the prior proceedings terminated in such a manner as to indicate his  
17 innocence.

18           Moreover, Rizzo has provided no evidence of malice, and he was prosecuted with  
19 probable cause. Therefore, Defendants will be granted summary judgment on Count  
20 Four.

21           **B.     Count One: Gross Negligence**

22           Count One alleges that the City of Phoenix and Hardina had a duty of care not to  
23 recklessly endanger Rizzo’s rights and the City of Phoenix is vicariously liable for the  
24 conduct of its employees. It alleges Defendants breached their duty of care by entering  
25 Rizzo’s apartment without a search warrant or exigent circumstances, failing to promptly  
26 analyze the blood samples found in Rizzo’s apartment, arresting Rizzo without probable  
27 cause, grossly negligently investigating the assault of Collins, etc. However, the police  
28 entered the apartment from which Rizzo had been evicted with permission of the

1 apartment complex and under exigent circumstances.<sup>2</sup> They initially arrested Rizzo  
2 based on a misdemeanor arrest warrant issued by the City of Glendale and subsequently  
3 arrested him based on probable cause. They had no duty to process the blood samples  
4 from Rizzo's apartment faster than usual. The only possible basis for a negligence claim  
5 would be relying on inaccurate witness reports that Collins was stabbed by someone  
6 named "Frankie" and Rizzo was known as "Frankie," which led to charges against Rizzo  
7 instead of the person who actually assaulted Collins. However, the evidence does not  
8 show *gross* negligence.

9 Police are not liable for simple negligence in investigating crime:

10 The public has a vital stake in the active investigation and prosecution of  
11 crime. Police officers and other investigative agents must make quick and  
12 important decisions as to the course an investigation shall take. Their  
13 judgment will not always be right; but to assure continued vigorous police  
work, those charged with that duty should not be liable for mere  
negligence.

14 *Landeros v. City of Tucson*, 171 Ariz. 474, 475, 831 P.2d 850, 851 (Ct. App. 1992)  
15 (quoting *Smith v. State*, 324 N.W.2d 299, 301 (Iowa 1982)). But a municipality "may be  
16 liable if its police officers are *grossly* negligent in their investigation of a crime which  
17 results in an arrest." *Id.* To survive a motion for summary judgment on gross  
18 negligence, the plaintiff must show "the conduct of the police was outside the duty and  
19 standard of care required of them in that they had reason to believe that the information  
20 on which they based their arrest . . . was not trustworthy." *Id.*

21 Probable cause alone defeats this claim. Further, to establish probable cause for  
22 arrest, the police ordinarily may rely on information received from a witness shown to be  
23 reliable and trustworthy. *Cullison v. City of Peoria*, 120 Ariz. 165, 167, 584 P.2d 1156,  
24 1158 (1978). Hardina had no reason to think that the witnesses who said Rizzo  
25 introduced himself as "Frankie" were unreliable. Few neighbors knew Rizzo, and even  
26 the maintenance man for the apartment complex did not know Rizzo's name. Therefore,

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27 <sup>2</sup> In response to the motion for summary judgment, Rizzo said he "does not contest  
28 the legality of the entry into Apartment A-11." (Doc. 112-1 at 13, ¶ 11.)

1 even though the police interviewed many people, the fact that no one corroborated the  
2 witnesses' identification of Rizzo as "Frankie" was not sufficient to raise suspicion about  
3 their reliability. Rizzo has not shown gross negligence by Defendants.

4 Therefore, Defendants will be granted summary judgment on Count One.

5 **C. Count Two: Violations of Right of Due Process of Law and Right to**  
6 **Privacy Under the Arizona Constitution**

7 Count Two alleges Defendants violated Rizzo's rights under article 2, § 4 and  
8 article 4, § 8 of the Arizona Constitution by seizing Rizzo in his apartment without  
9 probable cause or exigent circumstances and confining him to jail for nearly eight  
10 months. But Rizzo was arrested in his apartment based on a misdemeanor arrest warrant  
11 from the City of Glendale and subsequently was detained after a grand jury indictment.  
12 Rizzo had no reasonable expectation of privacy in his apartment for which he no longer  
13 had a right to occupy, and he expressly does not challenge the search of his apartment.  
14 (Doc. 112-1 at 13, ¶ 11.)

15 Further, Rizzo does not cite any authority holding that the Arizona Constitution  
16 provides a private right of action. He only speculates that Arizona would recognize an  
17 implied private right of action for a state constitutional violation because more states  
18 have done so than states that have rejected it entirely or permitted it in narrow  
19 circumstances.

20 Therefore, Defendants will be granted summary judgment on Count Two.

21 **D. Count Three: False Imprisonment**

22 Count Three alleges Defendants "falsely and wrongfully imprisoned Rizzo, both  
23 following his initial arrest on September 12, 2013, and after all criminal charges were  
24 dismissed on April 1, 2014." (Doc. 1-1 at 13, ¶ 75.) False imprisonment is "the  
25 detention of a person without his consent and without lawful authority." *Slade v. City of*  
26 *Phoenix*, 112 Ariz. 298, 300, 541 P.2d 550, 552 (1975). "A detention which occurs  
27 pursuant to legal authority, such as a valid warrant, is not an unlawful detention." *Id.*  
28

1 In this case, Rizzo was initially arrested on a misdemeanor warrant from the City  
2 of Glendale, which he does not claim was issued without lawful authority. Subsequently  
3 he was detained on an arrest warrant and grand jury indictment that were based on  
4 probable cause.

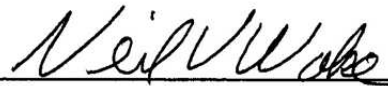
5 Further, under Arizona law, a claim for false imprisonment must be filed within  
6 one year after the cause of action accrues. A.R.S. § 12-541(1). The claim accrues upon  
7 arrest. *Hansen v. Stoll*, 130 Ariz. 454, 460, 636 P.2d 1236, 1242 (Ct. App. 1981). Rizzo  
8 was arrested on September 12, 2013, but did not file suit until April 1, 2015. Rizzo did  
9 not respond to Defendants' motion for summary judgment that his claim for false  
10 imprisonment is time-barred. Therefore, Defendants will be granted summary judgment  
11 on Count Three.

12 IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment  
13 (Doc. 108) is granted.

14 IT IS FURTHER ORDERED that the Clerk enter judgment against Plaintiff  
15 Denny Rizzo on his complaint and in favor of Defendants City of Phoenix and Anthony  
16 Hardina, and that Plaintiff take nothing. The Clerk shall terminate this case.

17 Dated this 28th day of July, 2017.

18 Dated this 28th day of July, 2017.

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22 Neil V. Wake  
23 Senior United States District Judge  
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